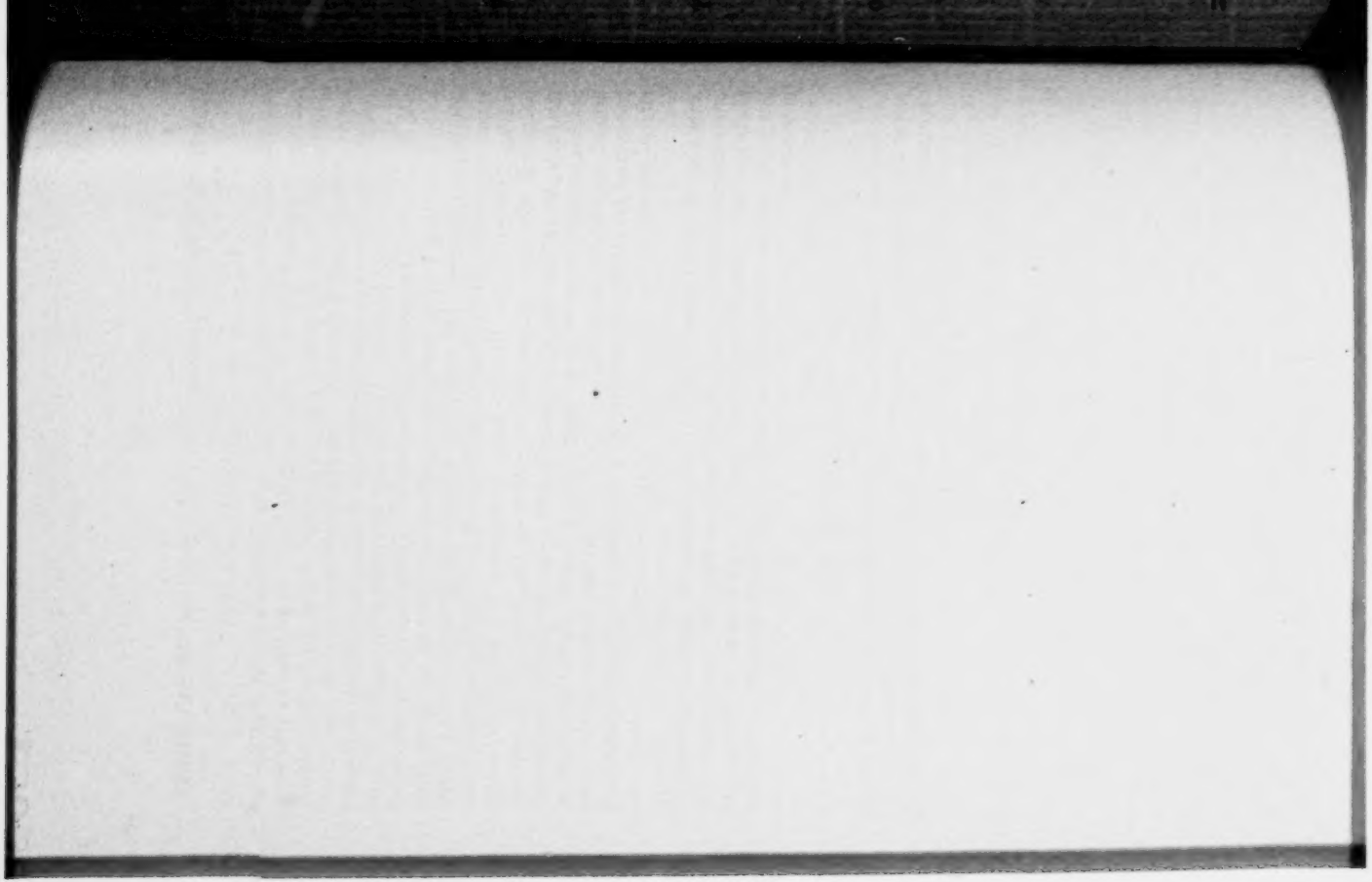


# Supreme Court of the United States

## OCTOBER TERM, 1900.

## No. 309.

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WILLIAM B. DINSMORE AND C. GRAY DINSMORE, AND WILLIAM B. DINSMORE, C. GRAY DINSMORE AND DUMOND CLARK, AS EXECUTORS AND TRUSTEES UNDER THE WILL OF WILLIAM B. DINSMORE, DECEASED, APPELLANTS.

*vs.*

THE SOUTHERN EXPRESS COMPANY; L. N. TRAMMELL, THOMAS C. CRENSHAW, JR., AND SPENCER R. ATKINSON, COMPOSING THE RAILROAD COMMISSION OF THE STATE OF GEORGIA, ET AL, APPELLEES.

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CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND RETURN.

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*Brief of FRANK H. MILLER for Petitioners in Certiorari and Appellants, Particularly in Reply to Positions taken in Brief of the Attorney General of the State of Georgia of file.*

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I.

The Attorney-General says:

(1). That the Complainants' bill is in effect, a suit against the State, and she cannot be sued, as she has not given her consent.

This proposition is untenable. This is not a suit against the State, but a suit against certain persons who attempt, in the name of a State

Commission, to coerce a State corporation partly owned by complainants. The State of Georgia has not authorized the Railroad Commission to determine and prescribe rates, rules, and orders for laying and collecting the taxes of, as to it, a foreign Government. If it did it would be entirely beyond the authority of the State so to do. The State can only act in the line of its powers; it can only legislate on State matters; the State Commission can only prescribe rules and regulations for the transportation of freight and passengers *within the State* (70 Ga., 694; 128 U. S., 174), and the question as to who—whether the express company or the shipper—shall pay the internal revenue tax of the United States is a matter entirely beyond the State's control. And to say that a suit to restrain officers who have thus usurped the name of the State to enforce their regulations in reference to the payment of a United States' internal revenue tax, is a suit against the State, is simply an effort to use the name of the State to shield an illegal act.

As to what is a suit against the State and what not, see *Smythe vs. Ames*, 169 U. S., 519; *Tindall vs. Wesley*, 167 U. S., 213, 220; *Tyler* case, 149 U. S., 190; United States vs. Lee, 106 U. S., 196; Scott vs. *McDonald*, 165 U. T., 68; 164 U. S., 592-5; 140 U. S., 1.

Again, it has been repeatedly held that suits against commissioners are not suits against the State. 57 Fed. R., 436; Elliot on R. R., §683, 700; 156 U. S., 657, *Gill case*; 164 U. S., 592, *Turnpike case*, 169 U. S., 517, *Ames case*.

Even if the statute under which the act is done be conceded to be constitutional. 154 U. S., 390, top to bottom, *Texas case*, 57 Feb. R., 436, *South Carolina Dispensary case*. The Fitts case 172 U. S., 529; has no application.

## II.

The Attorney-General says there is no equity in the Bill. Stockholders have a right to go into a Court of Equity to prevent the corporation from obeying an illegal or unconstitutional order which they fear might subject it to a penalty at the hands of the State Board of Commissioners, particularly when said Board of Commissioners had no authority nor jurisdiction to pass the order in question; and also, where the effect of their order would be to deprive them of their property without due process of law, or, in other words, prescribe rates for the corporation which would compel it to do business at a loss, thereby taking its property for the benefit of the public without just compensation being paid therefor, and thus denying it the equal protection of the laws, and possibly, subjecting the corporation to a multiplicity of suits.

169 U. S., 466, 517; 64 Fed. R., 165; 154 U. S., 362; 164 U. S., 592; 168 U. S., 169; 156 U. S., 649, 658; 162 U. S., 194, 197; Judge McCormick's decisions in 90 Feb. R., 683, 51 Feb. R., 529. Stockholders

can prevent in equity a corporation from voluntarily paying an illegal tax. Income tax case, 157 U. S., 429.

The Attorney-General demurs specially because there is an adequate remedy at law. This adequate remedy pointed out by him consists in waiting for suits to be brought against the express company for each failure to affix a stamp, and then for the express company to show in each case that the order of the commission upon which the suit is based was illegal. This would be putting all the chances against the express company. Instead of being an adequate remedy it would be wholly inadequate, because the express company might lose, and subject itself to severe penalties by so doing. Again, the Southern Express Company is obeying this order, and a request of the complainaints, made to it prior to suit, was refused and disregarded, so that, so far as complainants are concerned, with the express company obeying the order, the issue pointed out by the Attorney General could never be raised. The opportunity to raise the question of the adequate remedy by him pointed out would never occur, unless there was a suit brought to enforce penalties, which could not be brought against a corporation obeying the order of the State Commission.

169 U. S., 515-6.

## III

The Attorney-General says the United States Court has no jurisdiction.

(*a*) Because the Superior Courts of Georgia have exclusive jurisdiction.

It would be unconstitutional to deny to the complaints in this cause the same rights to sue in the Federal Courts which a Georgia citizen would have to sue in the Georgia Courts. The Georgia Courts may be exclusive (which is denied) for the citizens of Georgia, but such rule cannot apply to a non-resident.

In the *Texas Commission* case, 154 U. S., 362, the Court say, page 391, "Whenever a citizen of a state can go into the Courts of a State " to defend his property against the illegal acts of its officers, a citizen " of another state may invoke the jurisdiction of the Federal Courts " to maintain a like defence." Quoted in *Smythe vs. Ames*, the Nebraska case, 169 U.S., 517, although in that State a *special remedy* was given in the State Court.

See Ga. case, 70 Ga., 694, 704.

See also 164 U. S., 592, Turnpike case.

See Decisions of Judge Brewer on Circuit in Ames case, 64 Fed.R., 172, Quoted 2 Elliott on R. R., §702.

Adequate remedy at law is defined in 64 Fed. R., 172, as one absolutely and of right which gives relief from the wrong done, Texas Com. case, 154 U. S., 362, 2 Elliott, §702.

The Attorney-General also demurs

(*b*) Because the acts complained of are in the discretion of the Railroad Commission, and the Courts have no jurisdiction on the subject matter.

This cannot be the law. The Commission is not above the law, nor the process of the Courts. 154 U. S., 397; 169 U. S., 518-9; 164 U. S., 592-5. Besides the Commission has no jurisdiction whatever itself to frame laws, rules, and regulations providing for the payment of the internal revenue tax of the United States Government, of which they are no part.

The Commission is only a State administrative Board for carrying into effect the legislature's will. 116 U. S., 307; 154 U. S., 394-7.

And there is a remedy in the Courts to prevent their abuse of power and enforcement of unreasonable regulation. 164 U. S., 592 Turnpike case; 169 U. S., 516-19 Ames case; 156 U. S., 657 Gill case.

2 Elliott on R. R., §691, says question is no longer *open*.

57 Federal Report, 437, Judge Simonton. Judge Pardee in *Louisiana vs. LaGarde*, 60 Fed. Rep., 186-192.

If there was no remedy to inquire into the acts and rates fixed by the Commission, but its orders were conclusive, then the law under which it acts would be unconstitutional. 134 U. S., 418; 169 U. S., 523.

(*c*) The Attorney-General says the power to prescribe just and reasonable rates is legislative and not judicial, and the Courts have no jurisdiction to inquire whether the power is properly exercised.

If this is correct then the Supreme Court of the United States, the Supreme Court of Georgia, and of almost every other State in the Union, have made a great mistake in enjoining rates prescribed by Railroad Commissions, or enjoining orders promulgated by such bodies.

The question raised is not legislative, but one for "*judicial investigation.*"

154 U. S., 398 (middle); 134 U. S., 458; 169 U. S., 518; 156 U. S., 649, et 657. Turnpike case 164 U. S. bottom 579, at 592 5.

The powers of the Georgia Commission are not *legislative*. 70 Ga., 694-704; 128 U. S., 523; but *quasi* judicial, 2 Elliott on R. R., §683, or rather ministerial, 2 Elliott, §691. Page 997.

(San Joaquin &c. vs. Stanislaus Co., 90 Fed. R., 517-521.)

## IV.

*In conclusion.* The principal question in this case is as to the authority of a State Railroad Commission to "lay and collect" taxes for the general government. The Constitution of the United States gives Congress only authority to "*lay and collect*" Federal taxes. This Court has held, in the Michigan case, 177 U. S., 404, that the stamp duty is a floating or shifting tax, and that the express company has the right to contract with the shipper for its payment. The State

law also gives the express company the right to make a special contract as to carriage.

Therefore, when a Railroad Commission distinctly decides that the express company alone shall pay this tax, it in effect violates the Act of Congress, which has not put this duty upon the express company only; and further, it usurps the power of Congress, in that it is a state authority, "lays" on the express company, a tax, which is alone the province of Congress to lay under the Constitution; and further, by its order notifies the company that it will enforce the collection of the taxes thus laid by requiring the express company to make the payment and compel this by confiscatory suits in the Superior Courts of the State.

Surely, all this is entirely outside of the authority given the Commission to fix rates for the carriage of passengers and freights and should be prevented.

Since the decision in this case in the Court below, the Supreme Court of Georgia, on June 5th, 1900, in the case of the Southern Railroad Company vs. Watson, 110 Ga., Reports, 687, when having before it section 2276 of the Code of 1895, which enacts, "A common carrier * * may make an express contract, and will then be governed thereby," and which was set up in behalf of a carrier of passengers, held, "It is our opinion that the provisions of this section of the Code do not apply in any way to a carrier of passengers, but they apply exclusively and alone to a *common carrier*, that is, a carrier of goods." So that the validity and force of this section, recognized in favor of the carrier of goods, would be in effect absolutely destroyed if it is in the power of the Railroad Commission of Georgia to deny to the express company its right to contract, and in addition, to order payment in full by the carrier, of this Federal tax, imposed upon each receipt for the shipment of goods by the company.

Respectfully submitted,

FRANK H. MILLER,

*Solicitor for Dinsmore et al., Augusta, Ga.*